IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-WC-01756-COA

MICHELLE McKENZIE **APPELLANT**

v.

HOWARD INDUSTRIES INC. **APPELLEE**

DATE OF JUDGMENT:	12/06/2018
TRIBUNAL FROM WHICH APPEALED:	MISSISSIPPI WORKERS' COMPENSATION COMMISSION
ATTORNEY FOR APPELLANT:	FLOYD E. DOOLITTLE
ATTORNEY FOR APPELLEE:	RICHARD LEWIS YODER JR.
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
DISPOSITION:	AFFIRMED - 02/11/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., GREENLEE AND TINDELL, JJ.

TINDELL, J., FOR THE COURT:

¶1. On February 23, 2012, Michelle McKenzie suffered a work-related neck injury while operating a paper extension machine at Howard Industries. McKenzie subsequently filed a workers' compensation claim against Howard Industries. Following a hearing on the merits, an administrative judge determined that McKenzie had suffered a 10% loss of wage-earning capacity and ordered permanent disability benefits beginning on April 24, 2013, for a period of 450 weeks. The judge also found that apportionment was not applicable to McKenzie's claim.

¶2. McKenzie and Howard Industries both filed a petition for review with the Workers' Compensation Commission. Upon review, the Commission unanimously reversed the

administrative judge's ruling and award of permanent disability benefits. In doing so, the Commission found that McKenzie suffered no loss of wage-earning capacity, and as such, they declined to address apportionment. McKenzie appeals the Commission's decision, and finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3. In 2012, McKenzie worked as a coil helper for Howard Industries. McKenzie's primary job duties included operating two machines—a paper extension machine and a "fast cutter" machine. To operate the paper extension machine, McKenzie had to unload the machine by lifting a 40-50 pound bar. She would then manually pull an overhead crane to lift a paper roll and place it on the floor. Then, McKenzie would lift the bar again and stick the bar to the paper roll. Finally, she used the crane to lift the bar and paper roll onto the machine. In operating the "fast cutter" machine, however, McKenzie was not required to lift the paper roll bar because it was attached to the machine. McKenzie used the crane to lift the paper rolls onto the machine. Still, she often had to lift the paper rolls, which weighed approximately 30 pounds, and place them on the floor into order to lift them with the crane. On February 23, 2012, McKenzie lifted the bar from the paper extension machine and injured her neck. This injury resulted in the foregoing workers' compensation claim.

¶4. Prior to her 2012 injury, McKenzie underwent neck surgery in 2010, wherein Dr. David Yeh removed her C4-5 vertebra and placed screws and a metal plate in McKenzie's neck. After the 2010 surgery, McKenzie returned to work with no restrictions and suffered no pain or discomfort as a result of this surgery.

¶5. Following her injury, on April 12, 2012, Dr. Yeh performed a second neck surgery on McKenzie for an acute herniated disc. On April 24, 2013, Dr. Yeh determined that McKenzie had reached maximum medical improvement (MMI), but he assigned McKenzie an impairment rating of 9% to the whole body and restricted her to a light-work level of 20 pounds.

¶6. McKenzie returned to work for Howard Industries soon after her MMI date.[1] Prior to her injury, McKenzie was classified as a Division 1 coil helper and earned $12.46 per hour. Upon returning to work, McKenzie resumed the same position as a Division 1 coil helper, but her wages increased to $12.56 per hour. Because of her restrictions, she was no longer able to operate the paper extension machine and "fast cutter" machine as she did pre-injury, and she was moved to operating a strip machine. To operate the strip machine, McKenzie threaded paper into the machine and then taped paper strips into bundles. Because McKenzie is restricted to a 20-pound weight limit, another employee assisted McKenzie by loading the 29-pound paper rolls onto the strip machine.

¶7. On March 20, 2018, an administrative judge held a hearing on the merits of McKenzie's claim to determine the existence and extent of permanent disability and to determine whether any permanent disability could be apportioned to a pre-existing condition. At the hearing, McKenzie testified that she continued to work full-time operating the strip machine and that this job conformed with Dr. Yeh's restrictions. McKenzie also agreed that

[1] The record does not provide the exact date on which McKenzie returned to work after her 2012 neck surgery, but her testimony at the workers' compensation hearing indicates that she returned to work shortly after her MMI date on April 23, 2013.

she was presently earning higher pay than before her injury. At the time of the hearing, McKenzie earned $13.01 per hour, and her restrictions did not prevent her from working overtime hours. She also stated that she had not applied for any other jobs post-injury.

¶8. However, McKenzie testified that she continued to suffer from chronic neck and arm pain, tingling, and numbness in her hands and fingers following her 2012 surgery, which continued throughout her case. Also, McKenzie stated that she suffered from back problems and began receiving epidural steroid injections from Dr. Parker Lynn Bell sometime in 2014. On February 22, 2017, Dr. Bell reviewed Dr. Yeh's final medical report from April 23, 2013, and agreed with the restrictions and 9% impairment rating placed upon McKenzie. Also, Dr. Rahul Vohra performed an Employer Medical Evaluation on McKenzie on behalf of Howard Industries. In his evaluation, Dr. Vohra concluded that McKenzie was at MMI from her work-related injury. Dr. Vohra gave McKenzie a 7% impairment rating to the whole person with 4% of that rating apportioned to her first cervical surgery. Dr. Vohra assigned McKenzie a 3% permanent impairment rating for her on-the-job injury.

¶9. When asked about her previous employment, McKenzie testified that she worked for a store called Worn Craft, where she placed tags on clothes and folded them. She also worked as a cashier and a waitress in a restaurant. Even with her current restrictions, McKenzie testified that she could perform these jobs. McKenzie also stated that she worked in a chicken factory rounding chicken wings. Because of her chronic pain and tingling in her neck and arms, McKenzie did not believe that she could perform this type of job.

¶10. Angie Malone, a vocational rehabilitation expert, testified on behalf of McKenzie at

the hearing. Malone testified that she met with McKenzie in June 2017 and reviewed information regarding McKenzie's age, education, work history, and medical condition. Malone administered several tests to McKenzie in order to evaluate what jobs McKenzie could perform out in the workforce and determined McKenzie's vocational status. Malone performed a job survey to determine what jobs McKenzie could perform in her community and the current and periodic availability for these jobs.

¶11. Malone also stated that she evaluated McKenzie's job duties at Howard Industries prior to her injury and determined that her work on the paper extension and "fast cutter" machines were considered medium-duty work. Based upon this pre-injury ability, Malone determined that McKenzie could perform approximately 6,069 jobs prior to her injury. After evaluating McKenzie and the medical information from Drs. Yeh, Bell, and Vohra, Malone determined that McKenzie could no longer perform the same jobs as she could pre-injury. When Malone took into account McKenzie's pre-injury jobs with her post-injury restrictions, she determined that McKenzie suffered a 14% loss of access to her pre-injury jobs at Howard Industries and a 25% loss of access to her past occupations. Malone calculated that McKenzie suffered a 38% loss of access for all job titles in a competitive labor market. Using her job survey, Malone identified twenty current and periodic employment opportunities and had an earning potential of $9.25 per hour outside of her employment at Howard Industries.

¶12. However, on cross-examination, Malone testified that she had not physically or vocationally tested McKenzie. Malone also stated that her loss-of-access calculation was just

one factor in determining a person's loss of wage-earning capacity, and she had not performed any further evaluations regarding other factors that contribute to loss of wage-earning capacity. Another determination is whether or not the person was able to return to pre-injury employer, which McKenzie was able to do. Malone agreed that McKenzie returned to work for Howard Industries earning $0.51 more per hour than she did pre-injury. Malone also agreed that her loss-of-access calculations were based upon a sample of a nationwide competitive labor market and not localized to the region where McKenzie lived and worked.

¶13. John Risher, Howard Industries' Environmental and Safety Manager, testified on behalf of Howard Industries. Risher testified that he oversaw the company's workers' compensation claims and was aware of McKenzie's claim. Risher confirmed that McKenzie worked with Division 1 prior to her injury, making $12.46 per hour, and she returned to working full-time in the exact same division after her MMI date, making $12.56 per hour. He also testified that she was placed on the strip machine, which is within McKenzie's medical restrictions and a necessary production job for the company. Risher also explained that no employee at Howard Industries is guaranteed to work 40 hours per week or overtime. Risher stated that the company often allowed for changes in an employee's job duties. Finally, Risher testified that, at the time of the hearing, McKenzie earned $13.01 per hour with potential for overtime hours.

¶14. Pete Mills testified on behalf of Howard Industries as a vocational rehabilitation expert. Mills testified that he prepared a job analysis of McKenzie's position as a Division

1 coil helper. In preparation for this job analysis, Mills reviewed McKenzie's medical records from Drs. Yeh, Bell, and Vohra and visited Howard Industries to view and analyze McKenzie's current job of operating the strip machine. Based upon his evaluations, Mills testified that McKenzie had successfully returned to work after her injury and was performing a job that was within her medical restrictions. Mills also testified that McKenzie's job was a necessary production job at Howard Industries and that she was still classified as a Division 1 coil helper. Mills further testified that McKenzie's wages had increased and that she was capable of performing full-time work as well as overtime work.

¶15. When asked about Malone's loss-of-access analysis, Mills testified that he had not performed his own loss-of-access calculations. Mills also stated that while loss-of-access is one factor to consider in a loss-of-wage-earning-capacity analysis, another factor is whether McKenzie successfully returned to work. In his expert opinion, Mills testified that McKenzie had satisfied this second factor by successfully returning to work in her same pre-injury position.

¶16. After hearing the merits of McKenzie's case, the administrative judge issued an order on June 28, 2018, finding that McKenzie had suffered a 10% loss of wage-earning capacity. The judge awarded McKenzie permanent disability benefits of $41.20, beginning April 24, 2013, and continuing for a period of 450 weeks. The judge gave Howard Industries credit for any payments of compensation already made to McKenzie. The judge also ordered that Howard Industries pay for, furnish, and provide McKenzie all reasonable and necessary medical services and supplies as the nature of her injury or the process of her recovery may

require. Finally, the judge found that McKenzie returned to work with no restrictions or pain after her 2010 neck surgery, and therefore no evidence supported apportionment of McKenzie's permanent disability.

¶17. Following the judge's order, McKenzie timely filed a "Petition for Review" with the full Workers' Compensation Commission, asking the Commission to modify the amount of weekly permanent partial-disability benefits awarded. Howard Industries also filed a "Cross-Petition for Review" with the full Commission. On December 6, 2018, the full Commission reversed the decision of the administrative judge, finding that McKenzie had not sustained a loss of wage-earning capacity as a result of her injury. Aggrieved, McKenzie now appeals.

STANDARD OF REVIEW

¶18. In this workers' compensation case, we must determine "whether the Commission's decision was supported by substantial evidence, was arbitrary and capricious, was beyond the scope or power of the agency to make, or violated the claimant's constitutional or statutory rights." *Pulliam v. Miss. State Hudspeth Reg'l Ctr.*, 147 So. 3d 864, 868 (¶16) (Miss. Ct. App. 2014). The Commission acts as the trier and finder of facts in a workers' compensation case. *Forrest Gen. Hosp. v. Humphrey*, 136 So. 3d 468, 471 (¶14) (Miss. Ct. App. 2014). "If the Commission's order is supported by substantial evidence, this Court is bound by the Commission's determination, even if the evidence would convince us otherwise if we were the fact-finder." *Id*. We apply a de novo review for questions of law, and "reversal is proper where the Commission has misapprehended the controlling legal principles." *Id*.

ANALYSIS

¶19. On appeal, McKenzie asserts that the findings and opinions of the Commission were not supported by substantial evidence, contrary to the law, and arbitrary and capricious. McKenzie argues that sufficient evidence existed to prove that she suffered a loss of wage-earning capacity and was therefore entitled to permanent partial-disability benefits.

¶20. Mississippi Code Annotated section 71-3-7(1) (Supp. 2015) compensates employees "for disability . . . from injury . . . arising out of and in the course of employment, without regard to fault as to the cause of the injury . . . ." Mississippi Code Annotated section 71-3-3(i) (Rev. 2011) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment . . . ." The burden of proving disability and its extent lies with the claimant, who must show that there was "(1) an actual physical injury; and (2) [a] loss of wage-earning capacity." *Gregg v. Natchez Trace Elec. Power Ass'n*, 64 So. 3d 473, 476 (¶¶10-11) (Miss. 2011).

¶21. The parties stipulated that McKenzie suffered a neck injury on February 23, 2012, while operating the paper extension machine in the course of her job at Howard Industries. Therefore, our focus turns to whether McKenzie suffered a loss of wage-earning capacity. "[D]ecisions as to loss of wage-earning capacity are largely factual and are to be left largely to the discretion and estimate of the [C]ommission." *Neshoba Cty. Gen. Hosp. v. Howell*, 999 So. 2d 1295, 1298 (¶8) (Miss. Ct. App. 2009) (internal quotation mark omitted). "A rebuttable presumption of no loss of wage-earning capacity arises when the claimant's post-injury wages *are equal to or exceed* his preinjury wage." *Gregg*, 64 So. 3d at 476 (¶12)

(emphasis added) (citing *Gen. Elec. Co. v. McKinnon*, 507 So. 2d 363, 365 (Miss. 1987)). The presumption may be rebutted by

> evidence on the part of the claimant that the post-injury earnings are unreliable due to: (1) increase in general wage levels since the time of the accident, (2) the claimant's own greater maturity and training, (3) longer hours worked by the claimant after the accident, (4) payment of wages disproportionate to capacity out of sympathy to the claimant, and (5) the temporary and unpredictable character of post-injury earnings.

Pruitt v. Howard Indus. Inc., 232 So. 3d 822, 825 (¶10) (Miss. Ct. App. 2017) (citing *McKinnon*, 507 So. 2d at 365). "[A]ny other factor or condition which causes the actual post-injury wages to become a less reliable indicator of earning capacity will be considered." *Id*.

¶22. Before her injury, McKenzie worked as a Division 1 coil helper, earning a pay grade of 11-3 and a $12.46 hourly wage. At the hearing, McKenzie, Risher, and Mills all testified that McKenzie returned to work after her injury, resumed her same position as a Division 1 coil helper, and earned $12.56 per hour after her injury and $13.01 per hour at the time of the hearing. These facts clearly triggered the rebuttable presumption of no loss of wage-earning capacity, thereby shifting the burden to McKenzie.

¶23. McKenzie argues that the Commission ignored several factors in which she clearly rebutted the presumption of no loss of wage-earning capacity. First, McKenzie argues that Dr. Yeh's restrictions prevented her from performing the same pre-injury work, and she now requires another employee to assist her in lifting paper rolls now while operating the strip machine. Second, McKenzie argues that Malone's testimony established that these restrictions cause her to suffer a loss of access to jobs outside of Howard Industries. Third,

McKenzie also asserts that she has continuing pain and tingling and still needs medical treatment. Finally, McKenzie argues that her wages increased due to union-negotiated pay raises and that she "could not maintain [her] current job without the strenuous help of the union."

¶24. This Court dealt with a factually similar scenario in *Pruitt v. Howard Industries*. Pruitt injured his lower back while working as a final assembler at Howard Industries. *Pruitt*, 232 So. 3d at 824 (¶2). After surgery, Pruitt returned to work with certain restrictions, and he then began primarily operating a forklift, which he had not done prior to his injury. *Id*. at 824 (¶3) & n.1. Pruitt filed a workers' compensation claim, but both the administrative judge and the Commission ultimately found that Pruitt had failed to prove that he suffered any loss of wage-earning capacity. *Id*. at (¶4).

¶25. On appeal, Pruitt argued that he had presented ample evidence to rebut the presumption that he suffered no loss of wage-earning capacity in that (1) his doctors gave him a 3% post-injury impairment rating and light-weight work restrictions, (2) his restrictions prevented him from working the same job as he did pre-injury, (3) his restrictions prevented him from earning overtime pay, (4) his restrictions caused him to suffer a loss of access to jobs outside of Howard Industries, and (5) after surgery, he primarily operated a forklift, which he had not done before his injury. *Id*. at 826 (¶¶13-15). Upon review, we found that Pruitt's arguments failed to sufficiently overcome the rebuttable presumption. *Id*. at (¶12). The evidence at Pruitt's hearing established that he returned to the exact "same plant, in the same division, and in the same job but making a higher wage." *Id*. at 827 (¶15). Further, we

found that although Pruitt returned to work with restrictions, the evidence established that his post-injury job was a necessary production job at Howard Industries. *Id*. Finally, we found that Pruitt had continued his employment with Howard Industries, was in no danger of termination, and had not sought work outside of Howard Industries. *Id*. at (¶16). We held that "[u]nder our limited deferential standard of review, we cannot say that the Commission's decision was clearly erroneous." *Id*. at 826 (¶12).

¶26. In our case today, the same reasoning applies. McKenzie returned to work in the same plant as a Division 1 coil helper with the same 11-3 pay grade, with a $0.10 higher hourly wage, giving rise to the presumption that she had not sustained a loss of wage-earning capacity. Presenting almost identical arguments as those presented in *Pruitt*, the Commission found that McKenzie failed to rebut the presumption. We agree.

¶27. McKenzie argues that she successfully rebutted the presumption by presenting evidence that her wages were increased as a result of a union-negotiated pay raise and through Malone's testimony. She asserts that her restrictions not only prevent her from performing her same pre-injury jobs but also creates a loss of access to jobs outside of Howard Industries, thus creating a loss of wage-earning capacity. But determination of loss of wage-earning capacity must be made by evaluating the evidence as a whole, including any other available clues. *Tew v. Siemens Power Transmission*, 156 So. 3d 329, 332 (¶11) (Miss. Ct. App. 2010).

¶28. As the Commission explained in its order, the evidence as a whole was insufficient to support a finding that McKenzie had sustained a loss of wage-earning capacity.

Specifically, McKenzie returned to work after her MMI date in April 2013, earning the same or slightly higher wages than before her injury, and at the time of the hearing, she had remained in the same position with Howard Industries for five years earning even higher wages. Risher testified McKenzie returned to work performing a necessary production job for Howard Industries, and no evidence indicated that McKenzie would be terminated by the company. We agree that Malone provided expert testimony that McKenzie had suffered a loss of access to outside employment. But Malone admitted that loss of access was only one of several factors when determining loss of wage-earning capacity. Another factor was the employee's ability to return to work, which McKenzie, Mills, and Risher all testified that McKenzie had successfully done. Malone also admitted that her calculations were based upon a nationwide sample and that she had never vocationally or physically tested McKenzie. Further, there is no evidence in the record that McKenzie sought employment outside of Howard Industries and had been unsuccessful based upon her restrictions.

¶29. Finally, and unlike in *Pruitt*, McKenzie returned to work post-injury and was able to increase her own wage-earning capacity by working overtime hours and earning additional compensation.[2] This is likewise important because Risher testified that Howard Industries

[2] McKenzie cites *Gregg v. Natchez Trace Electric*, as one case in support of her loss-of-wage-earning-capacity argument. But in *Gregg*, the Mississippi Supreme Court found that the claimant had successfully rebutted the presumption of no loss of wage-earning capacity primarily because the claimant "had proven he was no longer eligible to earn on-call [or overtime] compensation because of the climbing restriction imposed due to the [claimant's] injury." *Gregg*, 64 So. 3d at 477 (¶14). The Supreme Court found that the claimant's post-injury ineligibility for additional on-call compensation affected his wage-earning potential, and therefore the claimant was entitled to disability relief. *Id*. at 478 (¶¶16-17).

does not guarantee any of its employees the opportunity for overtime pay, regardless of injury.

¶30. Because we are bound by a limited, deferential standard of review, we cannot say that the Commission's decision was clearly erroneous. The evidence as a whole supports the Commission's findings that McKenzie did not sustain a loss of wage-earning capacity as a result of her injury. As such, we affirm the Commission's decision to reverse the administrative judge's order.

CONCLUSION

¶31. Applying our limited standard of review, we find that the Commission properly applied the rebuttable presumption that McKenzie suffered no loss of wage-earning capacity, as her post-injury wages were higher than her pre-injury wages. Likewise, we find that substantial evidence supports the Commission's finding that McKenzie failed to rebut this presumption. We therefore affirm the Commission's decision.

¶32. **AFFIRMED.**

BARNES, C.J., CARLTON AND J. WILSON, P.JJ., GREENLEE, WESTBROOKS, McDONALD, LAWRENCE, McCARTY AND C. WILSON, JJ., CONCUR.